The Government of India v Cairn Energy India Pty Ltd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–27 OF 2001
FAIZA THAMBY CHIK J
31 OCTOBER 2002

Arbitration *— Award — Setting aside — Approach of court when dealing with an application to set aside an arbitration award*

Arbitration *— Award — Setting aside — Misconduct of arbitration panel — Whether arbitration panel has jurisdiction to hear dispute or differences — Whether arbitration panel had expressly ignored express condition of the Contract — Whether there were instances of assumptions and conjectures by arbitration panel — Arbitration Act 1952 s 24(2)*

Arbitration *— Award — Setting aside — Time limit for applying leave — Principles applicable — Rules of the High Court O 69 r 4*

The applicant entered into a production sharing contract ('the Contract') with the respondents and Oil and Natural Gas Corporation Ltd ('ONGC'). Under the Contract, the respondents and ONGC were granted a lease which confers them exclusive rights to carry petroleum operations. The first respondent, purporting to act on behalf of all the respondents, invoked the arbitration clause of the Contract. An arbitration panel was appointed in accordance with the Contract. Oral hearings of the arbitration were conducted in the Kuala Lumpur Regional Centre for Arbitration at Kuala Lumpur, Malaysia. The arbitration panel published their final award on 1 December 2000. The applicant sought to set aside the final award under s 24(2) of the Arbitration Act 1952. The time limited by O 69 r 4 of the Rules of the High Court 1980 ('the RHC') to file an application under s 24(2) of the Arbitration Act 1952 must be made within six weeks after the award has been published. In this case, the time limited to file an application to set aside the final award had lapsed.

Held, allowing the application:

(1) There were several instances of misconduct by the arbitration panel by exceeding their jurisdiction namely, the arbitration panel had ignored express conditions in the Contract. The arbitration panel did not have jurisdiction to hear any disputes or differences of the Contract as the pre-condition provided in the Contract that all disputes and differences had to be firstly referred to a sole expert prior to any arbitration hearing had not been conducted despite objections by the applicant (see p 361D–E).

(2) The final award contained numerous instances of assumptions and conjectures by the arbitration panel in arriving at the decision which were unsupported both by the evidence led nor the express terms of the Contract. The arbitration panel had made certain arbitrary findings in the final award which was not substantiated by the oral evidence led at the arbitration hearing (see p 361F–G).

(3) In an application for extension of time, the court will consider the following factors: (i) the length of the delay; (ii) the reasons of the delay; (iii) the prospects of success; and (iv) the degree of prejudice to the respondents if the application is granted (see pp 354I–355A).

(4) In the instant case, the applicant had raised four grounds to justify an extension of time. In addition, the first step in the litigation proceedings was the application to set aside the award, as contrast to where litigation proceedings had already commenced and parties were taking further steps by appealing against the decision of the judge. Furthermore, the advice sought was from foreign solicitors and the mistake, if any, was that of foreign solicitors and not that of local solicitors. Further, the applicant being a foreign entity could not be expected to readily know the laws of a different jurisdiction (see p 362F–I); *Tan Chai Heng v Yeo Seng Choon* [1981] 1 MLJ 271 and *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 distinguished.

(5) The applicant, at all material times, never intended to flout or to ignore the provisions of the RHC and hence the reason why the applicant was making an application for extension of time. The applicant has through its several affidavits filed in its support, raised several grounds to which the court may review and exercise its discretion accordingly. It never was the intention of the applicant to suggest that the RHC need not be complied with (see p 364C–D).

(6) The interpretation placed by the Court of Appeal in the case of *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 on the Supreme Court's judgment in the case of *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 was incorrect. A clear reading of *Ganda Edible Oils* clearly reflected that the courts have the right to intervene where the arbitrator has made wrong inferences of fact or has considered inadmissible evidence. The court would adopt the harmonious interpretation of both cases and stated that the correct approach to be adopted by the court in dealing with applications to set aside an award is that: (a) the court may set aside an award where the award relies on inadmissible evidence that violates the principle of natural justice and is repugnant to fairness and justice; and (b) the court may set aside an award where there was failure to analyze and appraise material and relevant evidence that affected

the award (see pp 366E–F, I, 367A–B); *Government of Sarawak, The v Sami Mousawi-Utama Sdn Bhd* [2000] 6 MLJ 433 followed.

[Bahasa Malaysia summary

Pemohon telah memasuki satu kontrak hasil bersama ('Kontrak tersebut') dengan responden-responden dan Oil and Natural Gas Corporation Ltd ('ONGC'). Di bawah Kontrak tersebut, responden-responden dan ONGC telah diberikan satu pajakan yang memberikan mereka hak eksklusif untuk menjalankan perusahaan petroleum. Responden pertama yang bermaksud untuk bertindak untuk kesemua responden telah menggunakan fasal timbangtara Kontrak tersebut. Satu panel timbangtara telah dilantik bersesuaian dengan Kontrak tersebut. Perbicaraan-perbicaraan lisan timbangtara telah dijalankan di Pusat Timbangtara Serantau Kuala Lumpur di Kuala Lumpur, Malaysia. Panel timbangtara telah mengumumkan award muktamad mereka pada 1 Disember 2000. Pemohon membuat permohonan untuk mengenepikan award muktamad tersebut di bawah s 24(2) Akta Timbangtara 1952. Masa yang dihadkan oleh A 64 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk memfailkan satu permohonan di bawah s 24(2) Akta Timbangtara 1952 harus dibuat dalam tempoh enam minggu selepas award diumumkan. Dalam kes ini, masa yang dihadkan untuk memfailkan satu permohonan untuk mengenepikan award muktamad tersebut telah luput.

Diputuskan, membenarkan permohonan tersebut:

(1) Terdapat beberapa kejadian salah laku oleh panel timbangtara yang telah melampaui bidang kuasa mereka iaitu, panel timbangtara tidak menghiraukan syarat-syarat nyata dalam Kontrak tersebut. Panel timbangtara tersebut tidak mempunyai bidang kuasa untuk mendengar apa-apa pertikaian atau perbezaan tentang Kontrak tersebut kerana pra-syarat yang diperuntukkan dalam Kontrak tersebut di mana semua pertikaian dan perbezaan perlu dirujuk terlebih dahulu kepada satu pakar sebelum apa-apa perbicaraan timbangtara, tidak dikendalikan meskipun terdapat bantahan-bantahan oleh pemohon (lihat ms 361D–E).

(2) Award muktamad tersebut mengandungi pelbagai andaian-andaian dan terkaan-terkaan oleh panel timbangtara dalam membuat keputusan yang tidak disokong oleh keterangan yang telah dikemukakan mahupun terma-terma nyata Kontrak tersebut. Panel timbangtara telah membuat penemuan-penemuan timbangtara yang khusus dalam award muktamad tersebut yang tidak disokong oleh keterangan lisan yang dikemukakan di perbicaraan timbangtara tersebut (lihat ms 361F–G).

(3) Dalam satu permohonan untuk lanjutan masa, mahkamah akan menimbangkan faktor-faktor berikut: (i) jangkamasa kelewatan; (ii) sebab-sebab kelewatan; (iii) prospek kejayaan; dan (iv) tahap prejudis terhadap responden-responden sekiranya permohonan tersebut dibenarkan (lihat ms 354I–355A).

(4) Di dalam kes semasa, pemohon telah menimbulkan empat alasan untuk menjustifikasikan perlanjutan masa. Tambahan pula, langkah pertama di dalam prosiding adalah permohonan untuk mengenepikan award, berlawanan dengan di mana prosiding telahpun bermula dan pihak-pihak mengambil langkah seterusnya dengan membuat rayuan terhadap keputusan hakim tersebut. Tambahan lagi, nasihat yang diterima adalah daripada peguam asing dan kesalahan tersebut, jika ada, adalah kesalahan yang dilakukan oleh peguam asing dan bukan oleh peguam tempatan. Lagipun, pemohon, satu entiti asing, tidaklah boleh sangka sebagai berpengetahuan di dalam undang-undang bidangkuasa yang lain (lihat ms 362F–I); *Tan Chai Heng v Yeo Seng Choon* [1981] 1 MLJ 271 dan *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 dibeza.

(5) Adalah jelas bahawa pemohon pada setiap masa matan tidak pernah berniat untuk melanggar atau tidak menghiraukan peruntukan-peruntukan KMT dan justeru itulah pemohon membuat satu permohonan untuk lanjutan masa. Pemohon telah melalui beberapa afidavitnya yang difailkan sebagai sokongan, telah menimbulkan beberapa alasan di mana mahkamah perlu mengkaji semula dan menggunakan budi bicaranya sewajarnya. Ia bukan niat pemohon untuk mencadangkan bahawa KMT tidak patut dipatuhi (lihat ms 364C-D).

(6) Tafsiran yang diletakkan oleh Mahkamah Rayuan di dalam kes *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 ke atas penghakiman Mahkamah Agung di dalam kes *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 adalah tidak betul. Pembacaan yang jelas ke atas kes *Ganda Edible Oils* telah membayangkan dengan jelas bahawa mahkamah mempunyai hak untuk campurtangan bila mana penimbangtara telah membuat inferens-inferens fakta yang salah atau telah mengambil kira keterangan-keterangan yang tidak boleh diterima. Mahkamah akan mengambil taksiran harmoni kedua-dua kes tersebut dan menyatakan bahawa pendekatan yang betul yang perlu diambil oleh mahkamah apabila mengendalikan permohonan-permohonan untuk mengenepikan sesuatu award adalah: (a) mahkamah boleh mengenepikan sesuatu award bila mana award tersebut berlandaskan keterangan-keterangan yang tidak boleh diterima yang mencemarkan prinsip keadilan asasi dan bertentangan dengan kesaksamaan dan keadilan; dan (b) mahkamah boleh mengenepikan sesuatu award bila mana terdapat kegagalan untuk meneliti dan menilai perkara-perkara dan keterangan yang relevan yang menyentuh award tersebut

(lihat ms 366E–F, I, 367A–B); *Government of Sarawak, The v Sami Mousawi-Utama Sdn Bhd* [2000] 6 MLJ 433 diikut.

Notes

For cases on setting aside of an arbitration award, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1202–1245.

Cases referred to

Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd (and Anor Application) [2001] 1 AMR 825
Finnegan v Parkside Health Authority [1998] 1 All ER 595 (refd)
Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428 (refd)
Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd [2000] 2 CLJ 664, [2000] 1 MLJ 621 (not folld)
Government of Sarawak, The v Sami Mousawi-Utama Sdn Bhd [2000] 6 MLJ 433 (folld)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)
Ismail v The Polish Ocean Lines [1977] 2 Lloyds Rep 134 (refd)
Official Assignee v Chartered Industries of Singapore Ltd [1978] 2 MLJ 99 (refd)
Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)
Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 MLJ 424 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying [1987] 1 MLJ 110 (refd)
Tan Chai Heng v Yeo Seng Choon [1981] 1 MLJ 271 (refd)
Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [1998] 4 MLJ 297 (refd)
Universal Cargo Carriers Corp v Citati [1957] 3 All ER 234 (refd)
Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor [1997] 5 MLJ 601 (refd)

Legislation referred to

Arbitration Act 1952 ss 23, 24, (2)
Arbitration Act 1996 [Eng] s 57
Rules of the High Court 1980 O 3 r 5(1), (2), O 11 r 6, O 69 r 4, (1)

Rodney Gomez (*James Montero* with him) (*Shearn Delamore & Co*) for the applicant.

Vinayak Pradhan (*Ashok Kumar* and *Richard Khoo* with him) (*Khem Affendie*) for the respondents.

Faiza Thamby Chik J: This is an application filed by the applicant to move the court for an order as follows:

(1) the time limited by O 69 r 4(1) of the Rules of the High Court 1980 ('the RHC') be extended to enable the applicant to set aside the final award under s 24(2) of the Arbitration Act 1952;

(2) the final award made between the parties to the arbitration by the arbitration panel, namely Datuk George KS Seah, Mr Anthony Mulcare and Mr Shri AJA Tauro ('the arbitration panel') dated 1 December 2000 be set aside ('the final award').

On 18 June 2001, the court granted leave for the applicant to serve the cause papers out of jurisdiction on all the respondents. The said cause papers were successfully served on all the respondents. Pursuant to O 11 r 6 of the RHC, the said cause papers were served on:

(1) the first and second respondents by the plaintiff;

(2) the third respondent by Messrs Khattar Wong, namely the agent appointed by the plaintiff.

The brief facts are the applicant entered into a production sharing contract ('the Contract') on 28 October 1994 with the following parties:

(a) the first respondent;

(b) the second respondent;

(c) the third respondent; and

(d) Oil and Natural Gas Corporation Ltd ('ONGC').

The Contract dated 28 October 1994 is enclosed as exh 'SKS-1' in the applicant's first affidavit. Under the Contract, the respondent and ONGC were granted a lease which confers them exclusive rights to carry petroleum operations. In considerations of the lease, the applicant and ONGC undertook to implement Ravva Development Plan (see cl 11.2 (pp 48 and 174) as per Appendix F — exh 'SKS-1', the applicant's first affidavit) and to carry out approved work programmes and budget from 28 October 1994 until 31 March 1996 (as per Appendix G1 (p 93), Appendix G2 (p 4056) — exh 'SKS-11' applicant's first affidavit). The first respondent, purporting to act on behalf of all three respondents, invoked the arbitration clause, art 34.3 of the Contract. An arbitration panel consisting of Datuk George KS Seah, Mr Anthony Mulcare and Mr Shri AJA Tauro were appointed in accordance with art 34.4 of the Contract. Oral hearings of the arbitration were conducted in Kuala Lumpur Regional Centre at Kuala Lumpur, Malaysia during the periods of 27–28 October 1998; 17–26 May 1999 and 9–18 February 2000 pursuant to art 34.12 of the Contract. The arbitration proceedings were conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985 (pp 120–121 as per art 34.9 of the Contract). Upon completion of the oral hearings, both parties filed in their written submissions. The arbitration panel published their final award on 1 December 2000 (see exh 'SKS-5', applicant's first affidavit).

The applicant is hereby seeking to set aside the final award under s 24(2) of the Arbitration Act 1952. The time limited by O 69 r 4 of the RHC to file an application under s 24(2) of the Arbitration Act 1952 must be made within six weeks after the award has been published. In this case, the final award was published on 1 December 2000. The time limited to file an application to set aside the final award had lapsed. Nevertheless, the court has an unfettered discretion to grant an extension of time. The court may extend such period of time although the application is only made after the expiration of the said period. Order 3 r 5(1) and (2) of the RHC provides:

> r 5(1):
>
> The Court may on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.
>
> r 5(2):
>
> The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

In *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105, the High Court held at p 106:

> It is trite law that the court has an unfettered discretion to grant or refuse an extension of time. The first principle is that the rules of court must prima facie be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant.

In *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297, the Court of Appeal held (at pp 297 and 308):

> Order 3 r 5(1) and (2) of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend time even if the application is made after the expiry period. The primary consideration ... is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.
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> ...
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> '... . Such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.' (per Sir Nicolas Browne-Wilkin VC, in *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 at p 637.)

In *Finnegan v Parkside Health Authority* [1998] 1 All ER 595, the Court of Appeal held (at p 595):

> When considering an application for extension of time ... under O 3 r 5 [of the English Rules of the Supreme Court], [the court has] the widest measure of discretion. ... [The court shall look into] all circumstances of the case and to recognize the overriding principle that justice must be done.

In my opinion, in an application for extension of time, the court will consider the following factors:

(i) the length of the delay;

(ii) the reasons of the delay;

(iii) the prospects of success;

(iv) the degree of prejudice to the respondents if the application is granted.

In the instant case the applicant has deposed in its supporting affidavits the following reasons to substantiate its application for extension of time.

(i) Advice

The applicant was advised that the proper forum for challenging the final award was England. One of the main reasons for this advice was art 34.12 of the Contract that provides the arbitration agreement contained in art 34 of the Contract shall be governed by the laws of England and that there was a binding case law on the issue (see exh 'SKS-1', applicant's first affidavit and exh 'GSKS-17', applicant's second affidavit). On the advice of their English solicitors, Messrs Hammonds Suddards Edge, the applicant filed an application in England for an extension of time to challenge the award. The initial application was allowed but a subsequent application for extension of time and a preliminary ruling that on the threshold issue of jurisdiction, it was decided by the court in England that England was not a proper forum to file such an application. It must be noted that in the proceedings referred to above, the respondents were represented by English solicitors. As a result of the proceedings, the applicant had to go through various official procedures and government authorities to review the next course of action. A decision was made on 7 March 2001 to file the present application in the High Court of Malaya through Messrs Shearn Delamore & Co. The delay to file the application to set aside the final award in the Malaysian High Court was unintentional. The applicant was advised by their English solicitors that the proper forum to set aside the award was in England mainly because s 34.2 of the Contract expressly provides the Contract shall be governed by English law. The case of *Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying* [1987] 1 MLJ 110, 112, was referred to in *Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424, at pp 428–429 where it is suggested that the court must take into account the fact that the delay was caused by a mistake of the legal adviser. In *Ismail v The Polish Ocean Lines* [1977] 2 Lloyds Rep 134, the Queen's Bench Division held:

> Although the lawyers acting on behalf of the owners have been guilty of an oversight but as no prejudice would be done to the charterers, an extension of time was allowed.

(ii) Foreigner and Rules

The applicant being an independent and sovereign body was unfamiliar with the rules governing the High Court proceedings in the High Court of Malaya. The arbitration proceedings were conducted

in accordance with the UNCITRAL Model Law on International Commercial Arbitration 1985 that provides that any application to set aside the award may not be made after three months have elapsed from the date upon which the award is received or, if a request had been made under art 33, from the date on which that request had been disposed of by the arbitration panel (see art 34(3) of the UNCITRAL Model Law ('UML') (exh 'SKS-6', applicant's first affidavit)). The applicant was also under the impression that this time period of three months was applicable for any application to challenge the award in the High Court of Malaya. A request has been made to the arbitration panel under art 33 which is yet to be disposed off by the arbitration panel. The applicant vide their English solicitors sought clarification from the arbitration panel under s 57 of the English Arbitration Act 1996 and/or arts 33 and 34 of the UML (exh 'SKS-7', applicant's first affidavit) in respect of specific issues, ie trucking discount entitlement issues, freight differential issue and measurement issue. To date, the said clarification has not been disposed off by the arbitration panel. Correspondences were exchanged to discuss several issues pertaining to the applicant's request for clarification but the request for clarification was not at any point disposed off by the arbitration panel. The applicant's first affidavit has reference. Exhibit 'SKS-8' is a letter from George Seah acknowledging receipt of exh 'SKS-7'. Exhibit 'SKS-9' shows that the arbitration panel was of the unanimous view that both the applicant and the respondents be requested to obtain a ruling from the London High Court on several issues. Exhibit 'SKS-10' and 'SKS-11' are letters from Messrs Ashurst Morris Crisp (respondents' solicitors) contending that the arbitration panel is functus officio and that the applicant was out of time in making the clarification application. Exhibit 'SKS-12' is a reply from the applicant's solicitors that the English court has no jurisdiction, and exh 'SKS-13' is a further proposal from the arbitration panel. As such, the applicant was under the impression that it was within time to apply to set aside the final award since the three months' period provided under art 34(3) UML has not lapsed.

(iii) No prejudice

Further, the grant of extension of time shall not prejudice the respondents. Review of the facts after the award shows the applicant took steps to 'challenge' the award, ie seeking clarification and filing an action in England. It is clear that the respondents knew the applicant was not 'accepting' the award. Parties had made a mistake as to the 'jurisdiction' but should not be held against them especially taking into account the rules they were arbitrating under which they thought had been codified into a statute in Malaysia (parties were all foreigners). It must also be noted that the award itself prescribes the imposition of interest in the event the payments prescribed in the award is not made within 100 days of the award. Reviewing the three grounds stated above, I think there exists no intention to ignore the RHC by the applicant and there is no prejudice caused to the

respondents in the grant for extension of time which cannot be compensated by money.

It has been held as settled law that the following grounds enumerated in ss 23 and 24 of the Arbitration Act 1952 would be good grounds for the court to set aside or remit an award, namely:

(1) that the award is bad on the face of it;

(2) that there has been misconduct on the part of the arbitrator;

(3) that there has been an admitted mistake and the arbitrator asks that the matter be remitted; and

(4) where additional evidence has been discovered after making the award.

The applicant is only proceeding on grounds (1) and (2).

Talking about principle, it was laid down in three major cases:

(i) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, Raja Azlan Shah J (as DYMM then was) stated that an error of law is a ground for setting aside an award;

(ii) in the case of *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428, at p 430, the Supreme Court held that an arbitrator's award may be set aside for error of law appearing on the face of the award and the error of law appearing on the face of the award must be such that it can be found in the award or in the documents actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous;

(iii) and in *Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd (and Anor Application)* [2001] 1 AMR 825 at p 853, the High Court held:

> If there is a mistake of law on the face of the award of an arbitrator, that makes the award bad, the courts can interfere and the award can be set aside ... .

There are errors of law on the face of the final award made by the arbitration panel namely: the arbitration panel failed to consider that the date of the Contract merely reflected the date upon which the agreement was signed by the parties. The arbitration panel held that since the actual signing date of the Contract was 28 October 1994, instead of the originally envisaged date of 1 November 1993, it could have been anticipated that the date of commissioning the Single Point Mooring ('SPM') would be 1 November 1995 (see para 9.2, p 20 of exh 'SKS-5', applicant's first affidavit). This is as opposed to the express terms of the Contract, Appendix F: Ravva Development Plan Addendum-1 which provides that the first oil shipped through SPM under the revised date would be 1 November 1994 (see p 364 exh 'SKS-1', applicant's first affidavit), and the date of commissioning of the SPM as decided by the arbitration panel on 1 November 1995 is also contrary to the other Contract documents which indicate that the date of the commissioning of the SPM should be in 1994. The 'Work Programme

and Budget for November 1994 through March 1995' provides vide para 1.3 ('Production') that Command will assume the operatorship of the production operations on the date of the signing of the Contract (see Appendix G1 to the Development Plan at p 395 of exh 'SKS-1', applicant's first affidavit). RDP Charts Figure 44 period of completion for SPM should be the second quarter of 1994 (see p 325 exh 'SKS-1', applicant's first affidavit). Paragraph 3.11.1 of the Development Schedule shows that the installation of the loading line and SPM should be completed in Phase 1, 0–14 months (see p 231 exh 'SKS-1', applicant's first affidavit). In the case of *Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd* [2000] 2 CLJ 664 (also in [2000] 1 MLJ 621), I stated (at pp 664 and 667-668):

> [That there is an 'error of law on the face of the award'] if reference is made to inadmissible evidence[;] ... principles of construction not countenanced by the law are applied[;] or if the arbitrator applies principles not permitted or recognized by the law.
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> ...
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> [Further, it was held that 'errors of law'] should not be interpreted restrictively.
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> [I]f [the] award refers to a document or evidence as the basis for the decision, ... that document or evidence is deemed incorporated into the award and become available for review by the court.

Hence, this court in this case may review the Contract documents which were specifically referred to by the arbitration panel. The arbitration panel has erred in law for misconstruing the Contract documents, ie by ignoring the term provided in Appendix F; Ravva Development Plan Addendum-1 and other terms in the Contract which expressly provide for the day of commissioning the SPM on 1 November 1994. The arbitration panel has failed to provide a reasoned award and in particular for the freight differential entitlement issue (see para 9.2, p 22 final award at p 448, exh 'SKS-5', applicant's first affidavit). The applicant is contending that the respondent is contractually obliged to provide storage and loading facilities which can be loaded up to 120,000 DWT tanker in 36 hours. The arbitration panel decided that there is no implications from the Contract or evidence that suggests that the respondent is obliged to provide such facilities. However, the arbitration panel has failed to provide reasons for such a decision. This is contrary to art 31.2 of the UML which requires the arbitration panel to state the reasons of its award (see art 31.2 of the UML exh 'SKS-15', applicant's first affidavit). In the case of *Official Assignee v Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99 at p 100, it was held that the award was uncertain in how it had decided the matters referred and was therefore invalid and must be set aside.

The arbitration panel had in relation to the freight differential entitlement issue, failed to consider express terms in the Contract that imposes an obligation on the part of the respondents to install an SPM facility latest by 1 November 1994 and provide requisite storage facilities of adequate capacities for loading of 120,000 DWT in 36 hours (see para 9.2,

p 22 final award at p 4348, exh 'SKS-5', applicant's first affidavit). I am of the opinion that the following express terms failed to be considered by the arbitration panel with reference to the applicant's first affidavit:

(i) art 15.5(c)(i) (see exh 'SKS-1', p 59);

(ii) art 15.5(c)(ii) (see exh 'SKS-1', pp 59–60);

(iii) para 3.5 of Appendix F (RDP) attached to the Contract (see exh 'SKS-1', p 226);

(iv) para 3.7 of Appendix F (RDP) attached to the Contract (see exh 'SKS-1', p 229);

(v) para 3.11 of Appendix F (RDP) attached to the Contract (see exh 'SKS-1', p 231)

(vi) paras 1–3 of Appendix G1 of the Contract (see exh 'SKS-1', pp 395–397);

(vii) Ch 4 (Development of Appendix G2) of the Contract (see exh 'SKS-1', pp 410–412).

In the case of *The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* [2000] 6 MLJ 433, the High Court held (at p 450):

> The arbitrator had completely ignored the [pertinent] evidence [and arrived at the wrong finding].
>
> ...
>
> ... That is a serious failure to analyze and appraise material and relevant evidence which, following the decision of *Sharikat Pemborong Pertanian & Perumahan* (supra)], justifies the setting aside of the award.

The arbitration panel in relation to the measurement issue, had decided that a differential of up to 0.3% should be permitted on the Bill of Quantities towards transit loss, whereas the arbitration panel had earlier decided that no firm evidence was adduced on real loss as opposed to paper loss, which was arbitrary and unsustainable, and ignored the expert evidence of the applicant's witness which was to the categoric effect that transit loss is an item which would be allowable only if specifically agreed between the parties and that, in any event, 0.3% on the Bill of Quantities as transit loss is normally encountered only on long voyages of 60 hours or more which was not the situation in the instant case, where the voyage was only for eight hours (see p 450 exh 'LCK-5', applicant's first affidavit). The arbitration panel in their final award has decided on the following:

(a) the presence or absence of adequate settling time is relevant to the issue;

(b) the volume of tankage available at Ravva Terminal during the material time was not sufficient for adequate settling time and the problem was compounded by the fact that Ravva crude was waxy in nature;

(c) some losses in transit were possible and errors in measurement at Vizag/Chennai Refinery could not be ruled out. There was no detailed technical investigation carried out by the parties jointly or individually in the matter; and

(d) in view of the above, the arbitration panel has permitted a differential up to 0.3% of the Bill of Lading quantities towards transit loss. A

The arbitration panel has failed to appraise the following evidence which was adduced during the arbitration proceedings:

(a) evidence which shows that there is an inadequate settling time at the Ravva Terminal. Paragraph 3.7 of the Development Plan (in Appendix F of exh 'SKS-1', applicant's first affidavit) which deals with crude oil transportation and provides that 'stabilized crude' will be transferred to a tanker via an SPM buoy. Paragraph 3.5 of the Development Plan dealing with 'processing and storage' wherein it is stated that after suitable processing, the 'stabilized crude' is to be stored in two 2,500,000 barrels floating roof storage tanks, and Appendix G to the Development Plan, being the 'Work Programme and Budget' for the period of November 1994 through March 1995, para 4.12 in particular which provides for the cost of fabricating and installing a crude stabilization unit with a capacity of 40,000 bopd; B C D

(b) expert witness evidence called by the applicant showing that the measurement of crude oil at Ravva Terminal is inaccurate due to inadequate settling time and there was an excess of water content in the storage of crude oil at Ravva;

(c) expert evidence that there was no apparent transit loss observed between quantities loaded at Ravva and on arrival at Vishakapatnam and that transit loss of 0.3% could only be encountered in long voyages of 60 hours and not eight hours. E

In *Federal Flour Mills Bhd* at p 837, the High Court held:

> ... that the arbitrators erred in law in failing to analyze and appraise the material facts of the four (4) witnesses in the construction of r 1409 of the CPO Rules [Rules for Crude Palm Oil Futures Contract] and the established or accepted market practice. F

In *The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd*, the High Court held at p 448: G

> ... that a failure to analyze and appraise the evidence [will] vitiate the award [if] 'the evidence is material, relevant and had gone to affect the award ...'.

Similarly, in the instant case, the arbitration panel failed to consider expert witness evidence and the other material evidence set out above which suggests that there is no firm evidence on transit loss, and there is a possible error of measurement occurring at Ravva. Again, the final award was uncertain and ambiguous. The arbitration panel decided that there was no satisfactory evidence placed before the arbitration panel to account for the difference between the measurements at the Ravva Terminal and the Vizag/ Chennai Refinery, and the volume of tankage available at the Ravva Terminal during the material period was not sufficient for adequate settling time. Contrary to its finding, it awarded that a differential up to 0.3% H I

should be permitted on the Bill of Quantities towards transit loss. Further, there was no basis for the arbitration panel in awarding the differential up to 0.3% on the Bill of Quantities towards transit loss.

The arbitration panel had in delivering the interim award dated 28 October 1998 erred in failing to consider that there is a pre-condition provided in the Contract that all disputes and differences had to be referred, firstly, to a sole expert prior to any arbitration hearing (see arts 43.2 and 43.3 of the Contract, exh 'SKS-1', applicant's first affidavit). The arbitration panel has failed to consider that matters referred by the parties, particularly, the measurement issue which falls within art 20.7 of the Contract. Article 20.7 of the Contract not merely provides for revision of prices. It includes matters concerning selection of crude oils for comparison and the adjustment of prices, which if parties fail to agree shall be referred to a sole expert for determination. The final award contains numerous instances of assumptions and conjectures by the arbitration panel in arriving at the decision which are unsupported both by evidence and contrary to the express terms of the Contract.

I think there are several instances of misconduct by the arbitration panel here by exceeding their jurisdiction, namely, the arbitration panel had ignored express conditions in the Contract. The arbitration panel did not have jurisdiction to hear any disputes or differences of the Contract as the pre-condition provided in the Contract that all disputes and differences had to be firstly referred to a sole expert prior to any arbitration hearing had not been conducted despite objections by the applicant (see arts 34.2 and 34.3 UML at p 120, exh 'SKS-1', applicant's first affidavit). The first and second notice forwarded by the first respondent was without the lawful authorization nor mandate of the second and third respondent (see exh 'SKS-16', applicant's first affidavit). The deed of appointment dated 1998 and the arbitration clause was invoked by the first respondent on 11 September 1997 (see exh 'SKS-2', applicant's first affidavit). The arbitration panel failed to furnish a reasoned award, and in particular reference to the freight differential entitlement issue (see pp 442–443, exh 'SKS-5', applicant's first affidavit). The final award contains numerous instances of assumptions and conjectures by the arbitration panel in arriving at the decision which are unsupported both by the evidence led nor the express terms of the Contract. The arbitration panel had made certain arbitrary findings in the final award which was not substantiated by the oral evidence led at the arbitration which decided that a differential up to 0.3% should be permitted on the Bill of Quantities towards transit loss, whereas the arbitration panel had earlier decided that no firm evidence was adduced on real loss as opposed to paper loss, which was arbitrary and unsustainable, and ignored the expert evidence of the applicant's witness which was to the categoric effect that transit loss is an item which would be allowable only if specifically agreed between the parties, and that, in any event, 0.3% on the Bill of Quantities as transit loss is normally encountered only on long voyages of 60 hours or more, which was not the situation in the present case where the voyage was only for eight hours; and in the decision in respect of costs, the arbitration panel decided that the applicant pay 50% of the

common costs and 25% of the respondents' costs. This is contrary to art 3.2 of the Contract which provides that the rights, covenants, obligations and the responsibilities of the parties arising under the Contract shall be several and not joint and several (see p 24, exh 'SKS-1', applicant's first affidavit).

I think there are three decisions that highlight what connotes misconduct. In *Universal Cargo Carriers Corp v Citati* [1957] 3 All ER 234, at p 240, the court said:

> The award is not strictly final then, since the question of law is left to the court, and, as I said earlier, in such a case the court must have power to remit of its own volition if justice cannot otherwise be done. I think that in those cases the discretion of the court is wholly unfettered.

In *Sharikat Pemborong Pertanian & Perumahan*, the court said:

> In my judgment the plaintiffs' complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

In *Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor* [1997] 5 MLJ 601, at p 606, the High Court held:

> Whereas *Russel on the Law of Arbitration* (20th Ed, 1982) at p 422 states the following respecting 'misconduct':
>
> > 'It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence. It may, however, be misconduct if there are gross errors in failing to hear or improperly receiving evidence.'

With reference to *Tan Chai Heng v Yeo Seng Choon* [1981] 1 MLJ 271 and *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228, there was a solitary ground raised as a reason for an extension of time. In *Tan Chai Heng*, the solicitor was negligent for filing the notice of appeal outside the prescribed time, and in *Ratnam* there was a similar position as in the case of *Tan Chai Heng* but the delay arose because the client instructed the solicitor late. This is completely different from the instant case where the applicant has raised four grounds to justify an extension of time and the grounds can be summarized as follows: advice, governmental procedures, foreign party and Model Law Rules. Both cases cited above were instances where litigation proceedings had already commenced and the parties were taking a further step in the conduct of the litigation proceedings (by appealing against the decision of the judge). This must be contrasted against the facts of the instant case where the first step in the litigation proceedings was the application to set aside the award. These cases dealt with instances of mistakes by solicitors or errors of clients who are 'locals'. The pertinent point here is that being solicitors or individuals resident within the country, they ought to have known the laws applicable. This is contrasted to the instant case where the advice sought was from foreign solicitors and the mistake, if any, was that of foreign solicitors and not that of local solicitors. Further, the applicant here being a foreign entity cannot be expected to readily know the laws of a different jurisdiction.

A The primary consideration as derived from the case of *Ong Guan Teck* and *Thiruchelvasegaram* is whether the party can clearly demonstrate that there was no intention to ignore and/or flout the rules. In fact, in the case of *Scott & English* and that of *Sinnathamby*, the court recognized that a mistake on the part of the legal adviser was one of the factors that the courts should consider together with other materials before it in deciding whether to grant B the extension of time or not. The court, in making its decision, should also consider whether or not there is any real prejudice suffered by the respondents by the grant of an extension of time. The respondents have canvassed the argument that they are prejudiced because they have been deprived of the sums of monies awarded under the award. Even if this can be construed as a prejudice, I think the same can easily be compensated by C interest. In this respect, the award does provide for the imposition of interest of any unpaid amounts under the arbitration award (see exh SK-5 annexed to the affidavit of S Kannapan s/o Shanmugasundaram affirmed on 30 March 2001, found at jilid 2 at p 451 at para 10). The case of *Bhatia International v Bulk Trading SA & Anor* AIR 2002 SC 1432, (2002) 703 D LRIU 1, which has been cited by the respondents has no relevance to the facts emanating from the instant case. In order to appreciate this, it is necessary to examine the critical points of *Bhatia International*, which may be summarized as follows:

(a) there was an agreement to have the arbitration in Paris but the E arbitration had not been started;

(b) prior to the start of the arbitration, one party applied to the Indian Court for interim relief;

(c) the decision of the Indian Court was that the Indian Court does have jurisdiction to give an interim relief for an arbitration conducted F internationally unless it is contrary to the rules of the arbitration that the parties had agreed to arbitrate under.

It is clear that the facts in the case of *Bhatia* are completely different from the facts of the instant case. In the instant case, there is already a final decision by the arbitration panel. This is a material distinction as in the G *Bhatia* case, the arbitration panel had not made a decision and one of the parties was merely seeking interim relief (in court) prior to the final adjudication by the arbitration panel. I think the appropriate Indian case law relevant to the facts of the instant case is the Indian authority of *Sumitomo Heavy Industries Ltd v ONGC Ltd & Ors* (1998) 1 SCC 305 (see H exh 'GKS-17' annexed to the affidavit of Gurmukh Singh affirmed on 9 May 2002). The Supreme Court of India did in the case of *Sumitomo Heavy Industries Ltd* decide that the law that would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate. In the instant case, the arbitration agreement was to be governed by the laws of England and hence the explanation why the I applicant sought to file the application to set aside the proceedings in England. I think the applicant is not entitled under the laws of India to set aside the present award in India.

The respondent contended that the applicant's English solicitors had been negligent on, inter alia, two grounds: A

(i) failure to consult Malaysian solicitors on the proper forum to challenge the final award; and

(ii) in assuming that the Model Law provisions for setting aside the award will prevail over provisions in the domestic Arbitration Act 1952 in Malaysia. B

Perusing the documentary evidence in the instant case, it is observed that the issue of negligence was not raised by either party in the affidavits and is therefore irrelevant in the instant case. I think that all government bodies, irrespective of the nationalities, have certain governmental procedures that C must be complied with before any act or action can take place. It is plain that the applicant at all material times never intended to flout or to ignore the provisions of the RHC, and hence the reason why the applicant is making an application for extension of time. The applicant has through its several affidavits filed in its support, raised several grounds to which the court may review and exercise its discretion accordingly. It never was the D intention of the applicant to suggest that the RHC need not be complied with. Upon a proper reading of the Model Law it does not provide for the setting aside of a foreign arbitration award. The respondents seek to argue that the role of the High Court is that as specified by the Court of Appeal in the case of *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] E 2 MLJ 481. I am of the opinion that this is a very narrow construction of the principles relating to instances of setting aside an arbitration award. The principle found in the Supreme Court case of *Ganda Edible Oils* must be examined. In *Ganda Edible Oils*, the Supreme Court was faced with an appeal on an application to set aside the award. In that case, Syed Agil Barakbah SCJ had, at pp 430–431, set out the law in relation to applications F to set aside the award. He stated:

> The principles that have to be applied in the instant case may be set out as follows:
>
> > 'An arbitrator's award may be set aside for error of law appearing on the face to it, though the jurisdiction is not lightly to be exercised. Since G questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that that can be found in the award, or in H a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
> >
> > If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, I which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the

A arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.'

In *Halsbury's Law of England* (4th Ed) Vol 2, p 334, para 623, 'Error of Law B on Face of Award' it is stated:

A distinction should be drawn between a case where a dispute is referred to an arbitrator in which a question of law becomes material from the case in which a specific question of law has been referred to him. The position is that in the former case the court can interfere if and when an error appears on the face of the award but in the latter no such interference is possible upon the ground C that the decision on the question of law is an erroneous one (per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210). In that case, no question of law was referred to the arbitrator but what was submitted was a question of law, which incidentally and necessarily arose in applying certain facts. In our considered judgment in the present appeal, a similar situation D arose. It is clear that in applying certain facts, which led to the dispute between the parties, the arbitrator had also to construe the provisions of s 37 of the SGO, which was relied by the respondent and also s 42, which incidentally arose in applying those facts. Since the reference involved both questions of law and fact, the High Court was in a position to review the award if and when there is an error apparent on the face of the award.

E The question that should have arisen before the judge was (1) whether the arbitrator made wrong inferences of fact from the evidence including the four telexes which were incorporated in the award and (2) whether the arbitrator had erroneously construed the two sections.

The Supreme Court did, in stating that 'if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by F deciding on evidence which was not admissible, or on principles of constructions which the law does not countenance, there is error in law which may be grounds for setting aside the award', recognize that the acceptance of inadmissible evidence or applying wrong rules of construction would justify the setting aside of the award. In the Court of Appeal decision G in the case of *Hartela Contractors Ltd* and in particular at pp 488-489 where it stated:

At this juncture there is one other case which I think I ought to mention. It was not cited by either side. But I came across it while consulting the authorities upon the subject. It is a case that, on a first reading, caused me some difficulty. It is *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ H 428. Being a decision of the Supreme Court, it has binding effect. There, Syed Agil Barakbah SCJ said (at p 431):

'The questions that should have arisen before the judge were: (1) whether the arbitrator made wrong inferences of fact from the evidence including the four telexes which were incorporated in the award; and (2) whether the arbitrator had erroneously construed the two sections.

I In the first place, we are satisfied that the arbitrator had considered all the relevant evidence and had not made wrong inferences of fact. As regards the second point, we are also satisfied after careful consideration

that the arbitrator has construed the two sections correctly in the light of the facts and surrounding circumstances of the case. We also bear in mind that even if we could come to a different conclusion on the matter, we fail to see in the award that the arbitrator has proceeded illegally either by deciding on inadmissible evidence or applying the wrong principles of construction which the law does not recognize.' A

Putting aside for a moment the reference in the foregoing passage to the erroneous construction of the statute in question, which may well be regarded either as an error of law on the face of the award or as misconduct, the Supreme Court speaking through Syed Agil Barakbah SCJ appears at first blush to recognize an ability in a court to intervene on the ground that an arbitrator had made wrong inferences of fact or had considered inadmissible evidence. On the authorities that I have had the advantage of consulting, such a wide jurisdiction does not appear to exist. However, on a more careful reading of the case it is clear that the learned judge was merely adverting to the arguments made before the Supreme Court in that case and repelling a suggestion by counsel that the arbitrator there had drawn erroneous factual inferences or had considered inadmissible evidence. In my view, *Ganda Edible Oils* case is not, and should not be read, as authority for the proposition that the ordinary courts are seized of jurisdiction to remit or to set aside the award of an arbitrator on the ground that wrong inferences of fact had been drawn or that inadmissible evidence had been let in and acted upon. To do so would amount, in my respectful view, to the unwarranted exercise of an appellate function over private arbitrations which, of course, courts do not have. So far as inferences of fact are concerned, these really fall within the realm of the merits of the particular dispute and are of no concern of a court when considering an application to set aside an award. B C D E

I am of the view, with the greatest of respect, that the interpretation placed by the Court of Appeal in the case of *Hartela Contractors Ltd* on the Supreme Court's judgment in the case of *Ganda Edible Oils* is incorrect. A clear reading of *Ganda Edible Oils* (the relevant passages which were reproduced earlier) clearly reflect that the courts have the right to intervene where the arbitrator has made wrong inferences of fact or has considered inadmissible evidence, otherwise there was no reason for it to state the 'two questions that should have arisen before the judge ...'. The apparent conflict of both decisions have been judiciously considered in the case of *The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd*, in particular at pp 447–448. The learned High Court judge concluded that both cases can be read harmoniously as both *Hartela Contractors Ltd* and *Ganda Edible Oils* have decided different principles, namely: F G

(a) *Hartela Contractors Ltd* decided that inadmissible evidence must result in violations of the rules of evidence relating to natural justice which is repugnant to one's sense of justice or fairness before an award can be set aside (see p 448, para A–B of authority); H

(b) *Ganda Edible Oils* decided that failure to analyze and appraise evidence will vitiate an award if the evidence is material, relevant and had gone to affect the award. I

I would adopt the harmonious interpretation pronounced by the judge in the case of *The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* and

A state that the correct approach to be adopted by the court in dealing with applications to set aside an award is that:

(a) the courts may set aside an award where the award relies on inadmissible evidence that violates the principle of natural justice and is repugnant to fairness and justice;

B (b) the court may set aside an award where there was failure to analyze and appraise material and relevant evidence that affected the award.

There is an error of law on the face of the award vis-a-vis the date of commissioning of the SPM because the Contract documents all refer to the date when the SPM would be commissioned, which is 1 November 1994. C In fact, the arbitration panel expressly recognized that this date is reflected in the Contract documents as can be seen at p 16 of the award (see exh 'SK-5' annexed to the affidavit of S Kannappan s/o Shanmugasundaram affirmed on 30 March 2001 found at jilid 2, p 442). Yet the arbitration panel has utilized oral evidence to arrive at the conclusion that 'in the absence of evidence to the contrary', that the first shipment was meant to D be 1 November 1995. The mistake is further compounded because it was recognized by the arbitration panel that the applicant was making regular deductions due to this delay (see exh 'SK-5' annexed to the affidavit of S Kannappan s/o Shanmugasundaram affirmed on 30 March 2001 found at jilid 2, p 437). The arbitration panel by taking into account irrelevant oral E evidence had effectively 're-written' the contractual obligations of the parties, which, I am of the opinion, that they had no authority to do so. This clearly falls within the ambit of the principles found in the case of *Ganda Edible Oils* and in the case of *Hartela Contractors Ltd*, namely:

(i) inadmissible evidence (as to the date of commissioning) violated the F principles of justice in that the arbitration panel had ignored the express terms contained in the Contract provisions;

(ii) there was a failure to analyze and appraise material and relevant evidence as can be seen by the statement 'in the absence of evidence to the contrary, the first shipment was expected not later than 2 November 1995'. Here the failure was that the express terms in the G Contract documents were ignored without justification.

Talking on the freight differential entitlement issue, I am of the opinion that the respondent has failed to appreciate that the arbitration panel has not disclosed the rationale and the reasons behind its decision. In particular, as can be seen in exh 'SK-5' annexed to the affidavit of S Kannappan s/o H Shanmugasundaram affirmed on 30 March 2001, at jilid 2, p 448, the arbitration panel had not set out any reasons for its decision. The failure to disclose the reasons reflect that the arbitration panel had presumably failed to consider again the express terms of the Contract to the contrary to the findings. On the measurement issue, there was evidence that the loss could have arisen due to inadequate settling time and the existence of water I content at the storage centre for crude oil. Expert evidence that transit losses are generally encountered in long voyages of 60 hours and more as opposed to this instant case of eight hours. There was no evidence of an

actual 0.3% representing transit loss and hence the percentage of 0.3% was an arbitrary figure selected by the arbitrator. A

For these reasons, I grant order in terms of (1), (2) and (3) of the application.

Application allowed.

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Reported by Peter Ling

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